

EXHIBIT A

January 8, 2021 Hearing Transcript

Page 1

1 UNITED STATES BANKRUPTCY COURT
2 EASTERN PENNSYLVANIA
3 Case No. 01-01139
4 - - - - - x

5 In the Matter of:

6

7 W.R. GRACE & CO., et al.,

8

9 Debtors.

10 - - - - - x

11

12 United States Bankruptcy Court
13 Robert N.C. Nix Sr. Federal Courthouse
14 900 Market Street
15 Philadelphia, PA 19107

16

17 January 8, 2021

18 11:46 AM

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21 B E F O R E :

22 HON ASHELY M. CHAN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO - JOAN RANIERI

Page 2

1 **HEARING re Request for Extension**

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25 **Transcribed by: Sonya Ledanski Hyde**

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1 A P P E A R A N C E S :

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8 BY: JAMES E. O'NEILL, ESQ. (TELEPHONICALLY)

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17 ALSO APPEARING TELEPHONICALLY:

18 VIKTORIYA SHPIGELMAN

19 GARY S. SMOLKER, pro se

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1 P R O C E E D I N G S

2 THE COURT: Good afternoon. This is Judge Chan's
3 12:00 list for January 8th. The only matter is W.R. Grace &
4 Co. It's a telephonic conference regarding Mr. Smolker's
5 request for extension. Could counsel and parties make their
6 appearances, please?

7 MR. O'NEILL: Yes, Your Honor, sorry. This is
8 James O'Neill for W.R. Grace. I'm from the firm of
9 Pachulski, Stang Ziehl & Jones. And joining me on the
10 telephone today is my co-counsel in this matter, Roger
11 Higgins, and also we have our client, Viktoriya Shpigelman
12 from Grace.

13 MR. SMOLKER: Hi. I'm Gary Smolker, the claimant.

14 THE COURT: Mr. Smolker, you filed your response
15 to the summary judgment motion. I see that there are -- it
16 looked like there were two filings: one was on January 4th,
17 2021, it's 767 pages; that was the declaration and
18 opposition to the summary judgment motion. There's also an
19 entry on the same day, January 4th, it's 19 pages, that
20 contains some exhibits, additional exhibits to your
21 opposition.

22 I see that, you know, technically, these filings
23 were after the December 30th date that we had discussed the
24 last time when we were together. And I understand from -- I
25 guess I've seen, you know, that you did try to serve that

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1 and file that in a timely fashion, and I'm not sure if it
2 was just the length of the pages or whatever, but, you know,
3 it didn't get filed until the 4th.

4 MR. SMOLKER: Actually, I have a statement from
5 Federal Express saying it was served with the Court on
6 December 30th at 11:18. Actually, what happened is when
7 it's given to the Court, it's not filed; they take time to
8 file it. I actually have somebody from Federal Express
9 saying it was served with the Court on December 30th.

10 THE COURT: I've had trouble sending and receiving
11 packages during the holiday season, and I hear it was
12 unprecedented, so I'll take your word on it unless anyone
13 else wanted to chime in, but that, you know, you did try to
14 do that on time.

15 But the reason why we're here today is because
16 you're requesting additional time? I was just wanting to
17 understand what it is that you wanted to file and why you
18 think you need more time for this.

19 MR. SMOLKER: Thank you very much. Could you
20 repeat what you said you received because our connection is
21 not entirely clear. Apparently, (sound glitch) there's a
22 delay and there's an echo (sound glitch). I heard you say
23 you have 762 pages. That's all I heard.

24 ESR CLERK: Excuse me, Judge. Before --

25 THE COURT: Would it be for Mr. Smolker to hang up

1 and call back in?

2 ESR CLERK: Do we have -- it's on speakerphone.

3 MR. SMOLKER: I'm not on speakerphone.

4 ESR CLERK: Okay.

5 MR. SMOLKER: I can call right back. I was on
6 speakerphone to begin with and then I picked up direct.

7 Should I hang up and I'll call (sound glitch) without
8 speakerphone?

9 ESR CLERK: No. Usually, you get an echo when you
10 have it on speakerphone; that's why I asked the question.

11 MR. SMOLKER: Yeah. Well, I'm off the
12 speakerphone, so why don't I just hang up and not go on
13 speakerphone. Would that be okay?

14 ESR CLERK: Judge?

15 CLERK: Is that okay, Judge?

16 THE COURT: Wait, I'm echoing too. It's the line.

17 ESR CLERK: I think everybody's echoing.

18 THE COURT: Mr. Smolker, why don't you call back
19 in, okay?

20 MR. SMOLKER: I'll call right back. Thank you.

21 CLERK: Judge, I'm also echoing, so I'm going to
22 go out and come back in too.

23 MR. O'NEILL: This is James O'Neill. I'm still
24 here. Do you hear (crosstalk).

25 ESR CLERK: Yes, I see you're still here. Ms.

1 Shpigelman is still here. I'm not echoing any longer, so
2 I'm not sure.

3 MR. O'NEILL: Okay.

4 ESR CLERK: I am echoing a little bit.

5 MS. SHPIGELMAN: This is Viktoriya Shpigelman. If
6 I need to dial back in, just let me know, but I'm not
7 hearing any echoes right now.

8 ESR CLERK: And I won't be speaking. All right,
9 Mr. Higgins is back in.

10 MR. SMOLKER: Hi. Gary Smolker back again.

11 ESR CLERK: Mr. Smolker, you're better.

12 MR. SMOLKER: I heard you clearly without an echo.

13 ESR CLERK: We're still waiting for the judge to
14 dial back in, and the gentleman in the courtroom got
15 deleted, dialed back in.

16 MR. SMOLKER: There's just a slight echo. It's
17 much less.

18 ESR CLERK: Yeah. Well, I don't hear you echoing
19 at all and I won't be speaking, so we don't have to worry
20 about my echoing. Guest with the last four digits 4869.

21 CLERK: Yeah, that's me. I came in the long way.
22 And the Judge can't get back on.

23 MR. SMOLKER: Anyway, who is the man I'm speaking
24 to?

25 ESR CLERK: Mr. Smolker, this is Judge Chan's ESR

1 clerk.

2 MR. SMOLKER: Hi. I don't know what ESR clerk
3 means, but welcome to the conversation.

4 ESR CLERK: I'm always there. I host the call.

5 CLERK: Yeah. She's hit the exit, so it won't
6 work. I told her to use the hyphen.

7 MR. SMOLKER: So are you guys having a pandemic
8 where you are?

9 CLERK: Yeah.

10 MR. SMOLKER: We're just totally wiped out here in
11 Los Angeles.

12 ESR CLERK: Now what happened? Joan dropped off
13 the call. All right, I'm not sure why we're having issues
14 with this call. I'm going to stop the recording.

15 (Break)

16 CLERK: So does anyone else have a problem using
17 the 302768# access code?

18 MR. SMOLKER: Gary Smolker does. I still have an
19 echo.

20 (Crosstalk)

21 CLERK: You were still able to use the code.

22 MR. SMOLKER: Yes.

23 THE COURT: Get through this hearing as quickly as
24 possible given that we've having these technical issues.

25 So, Mr. Smolker, I was saying before that I saw

1 your two filings that were logged on January 4th. You had a
2 700-plus page filing, and then you had an additional filing
3 that had some more exhibits to it, so I've seen all of that.
4 I wanted to know what else you may need to file and why you
5 need more time.

6 MR. SMOLKER: Thank you very much, and I have
7 something else to bring up if I may. But anyway, to answer
8 your question directly, I made a miscalculation on how much
9 time it would take me to gather all the exhibits I wanted to
10 refer to and to prepare my papers. And it turned out to be
11 impractical and impossible to get everything together and to
12 send it to the Court on December 29th, which I did by
13 Federal Express, priority overnight mail, and Federal
14 Express reported back to me that it was filed with the Court
15 on December 30th at 11:18.

16 And I spoke to Mr. Higgins -- I got email
17 communications from Mr. Higgins, who I sent by Federal
18 Express overnight also, that he received the entire package
19 on December 30th. And I assume Mr. O'Neill received it also
20 because my communications were to both of them, and although
21 it was from Mr. Higgins, it was with a copy to Mr. O'Neill.
22 So I don't know why Higgins and O'Neill got what they were
23 supposed to get on December 30th, and I have something from
24 Federal Express that said it was delivered, and I don't see
25 how it's possible that the Court didn't get it on December

1 30th also.

2 Mr. Higgins explained to me that it took a time
3 for the Court to upload what it had received and that that's
4 why there was a delay in filling it on the docket.

5 THE COURT: Mr. Smolker, I would like to move on
6 because there are technical issues, to the substance of the
7 hearing today. I would like you to address what additional
8 documents you think you need to file in this case and why
9 you needed the additional time.

10 So I hear you said that you had a lot of exhibits
11 that you didn't realize you were going to have to collect,
12 but what else did you want to file in this matter in
13 opposition to summary judgment; what other documents?

14 MR. SMOLKER: Hello, this is Gary Smolker
15 speaking. I have to prepare my memorandum in place with
16 authorities. My statement of facts with reference to where
17 it's found in the record, my objection to Grace's statement
18 of facts, which I say are not supported by the evidence, and
19 my description of what really happened because Grace's
20 presentation gives a misleading picture of what has gone on
21 and so forth.

22 And when I asked Grace for an extension, that
23 generated, according to my scale, 1.2 pounds of
24 correspondence. And I told Grace if they didn't want to
25 give me an extension, I would file a motion for permission

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1 to file additional documents in opposition to the summary
2 judgment motion. And I proposed that I have a hearing on
3 that at 1:30 p.m. or 2:00 p.m. Eastern time because there's
4 already a hearing scheduled for that to begin on the summary
5 judgment motion, and that I will file my motion requesting
6 more time on Friday, February 15th before 4:00 p.m., and I
7 will outline all the reasons why I need more time and I will
8 also attach what I want permission to file. And that will
9 give --

10 THE COURT: If you'll recall at the last hearing
11 we had in this matter --

12 MR. SMOLKER: Your Honor, I'm sorry. I was muted
13 and I couldn't hear whatever you said.

14 THE COURT: Can you hear me?

15 ESR CLERK: Judge, you're in and out.

16 THE COURT: Joan, what if I called you, could we
17 join in on the same line, because I need Mr. Smolker to hear
18 me.

19 ESR CLERK: Judge, let me see if I can up your
20 volume and see if that works. Okay, try speaking now.

21 THE COURT: Can you hear me now? This is Judge
22 Chan.

23 MR. SMOLKER: I can, thank you.

24 THE COURT: Sir, you may recall at the last
25 hearing that we had in this matter, I told you in no

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1 uncertain terms that I needed you to file all of your
2 documents in opposition to summary judgment no later than
3 December 30th. And I told you that I needed you to do that
4 by that date because the summary judgment motion had been
5 filed months before, and I needed to balance your need for
6 additional time with the plaintiff's right to have a hearing
7 and get a disposition on their summary judgment motion.

8 And I note for the record that it's now been four
9 plus months since you've been in possession of the summary
10 judgment motion, and at this point, I can no longer give you
11 additional time. And the fact that you can't even outline
12 for me today exactly what you're going to be saying, you
13 know, what you need to file in terms of your supplemental
14 briefing and the reasons for it, the fact that you can't
15 tell me that today and are proposing to file a motion in
16 February is, unfortunately, unacceptable to me.

17 I needed you to file all of your documents by then
18 and, frankly, I still don't understand why you would need to
19 file anything else since you've already filed 700-plus pages
20 of documents in this proceeding.

21 MR. SMOLKER: Well, first -- excuse me for
22 talking. I'll wait until you're done. Thank you.

23 THE COURT: Go ahead.

24 MR. SMOLKER: I can't hear you.

25 THE COURT: Mr. Smolker, and tell me your response

1 to that.

2 MR. SMOLKER: First of all, the time that I have
3 had this was because Grace didn't give me enough time to
4 respond and it took time for them to have a hearing before
5 you because they couldn't agree with me on how much time I
6 would have before you gave me more time to respond.

7 So it's not a question of how long, at least I
8 don't think it's a question of how long I've had their
9 paper. I think it's a question of how they have done things
10 so that I didn't have enough time, and that they have not
11 told the whole story. And I thought I just told you what I
12 would respond, so I'll repeat it and I'll give more detail.

13 I would file a memorandum of points and
14 authorities, which would walk you through the law. And by
15 the way, in the documents that I sent you are copies of the
16 California code sections -- the California Code of Civil
17 Procedure, the California Food & Agricultural Code, the
18 California Rules of Court -- in my points and authorities
19 and my declaration.

20 I would walk you through all those code sections
21 and show you how the motion to dismiss for five years should
22 never have been granted. It's clear as a matter of law that
23 it's a completely wrong decision because I could show you.

24 I would also -- and I did show you, my request for
25 rehearing of the Court of Appeal, and they refused to

1 address clear errors. For example, the Court of Appeal in
2 its decision said that I complained that I didn't get the
3 notice I was supposed to get for their summary judgment
4 motion. And I pointed out that I had given the Superior
5 Court a document which was their proof of service, which
6 showed that something they were supposed to send me by fax,
7 which was -- and this is just memory -- 235 pages, maybe it
8 was even more -- they only sent me 15 pages, so I didn't
9 even have the pages I was supposed to have by the time I was
10 supposed to get it, and then the trial judge ignored that.

11 And the Court of Appeal opinion said that I had
12 complained about that and there was nothing in the record to
13 support it. But I had given the Court of Appeal the
14 documents to support it, which was the proof of service, of
15 Grace of what it filed, and the Court of Appeal decision
16 said that they -- that means Grace -- had made a motion to
17 dismiss based on three years; whereas, you have the motion,
18 and you have what Grace said in its thing, the motion that
19 is made was five years.

20 And there are different code sections that have to
21 do with tolling and how orders work, and the bottom line was
22 that the five years never happened. And there's a Rule of
23 Court that says that when there is a stay order, that the
24 stay order is in effect until it is taken out of effect, and
25 the Superior Court Judge had put a stay order on the Grace

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1 proceeding -- this is by memory -- on February 2nd, 2001. I
2 attached a copy of that stay order in those 700-plus pages,
3 and I attached the California Rule of Court that says that
4 stay order stays in effect until the Judge undoes it, and
5 the Judge never undid it.

6 And this was made very clear to the Court of
7 Appeal, which you'll see both in -- well, in my request for
8 rehearing. And the Court of Appeal said that equitably it
9 was my duty to tell the Court that the Bankruptcy Court had
10 released their stay; whereas, it wasn't my duty, and I'll
11 show you that in the law, but Grace said, and Grace had told
12 the Superior Court that the Bankruptcy Court had released
13 the stay.

14 So it was just a façade to say that the Superior
15 Court didn't have notice or that I was supposed to give it
16 notice, and the opinion made up this equitable doctrine that
17 that occur in the law that it's my duty to tell the Superior
18 Court that the Bankruptcy Court stay has been released, and
19 therefore, I should be punished and it should be dismissed.

20 And I wrote in my rehearing motion that this had
21 not been briefed by any party, and there's a rule or a code
22 in California, which should be in all those documents I gave
23 you and it is in my petition for rehearing, which is in
24 those 700 documents, that says if the Court brings up
25 something that hasn't been briefed by any of the parties,

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1 then the Court has to have a hearing on that. And in my
2 petition for review, I pointed out that no party had brought
3 that up, that this is just something the Court brought up on
4 its own, and I wanted to have a hearing and a briefing on
5 it, which the Court didn't give me.

6 Also, of importance and overshadowing this is two
7 things. Grace does mention that I did bring a motion for
8 sanctions of over a million dollars against Grace's
9 attorneys, which I presented in those 700 documents, and
10 Grace did not object. Well, I have, under my declaration,
11 the fraudulent things Grace and its attorneys did both in
12 the Bankruptcy Court and in the Superior Court to obtain
13 what they obtained. And since Grace didn't object, they
14 had, under California law and I have federal law here, which
15 I'm not that familiar with, I'm still looking at -- that's
16 an admission. If you don't deny an accusation, that's an
17 admission.

18 So as far as I'm concerned, Grace and its
19 attorneys have already agreed that they defrauded the
20 Bankruptcy Court and that's before we even get to this
21 motion. And I have a different motion already set for
22 sanctions -- I think it's under 11(b) -- for how they've
23 misled this Court in all the papers that they're filing.

24 But, to me, besides the integrity of the court
25 system, the public health is of paramount importance, and

1 there is overwhelming evidence that this Syloid 244 is a
2 public health menace and it should be allowed to be used the
3 way Grace used it. And there's a Superior Court summary
4 judgment motion that Grace brought trying to get summary
5 judgment and the trial judge said, how could I possibly give
6 you summary judgment when your own shipping document says do
7 not let unprotected exposure to this happen, it's dangerous.

8 And so, in addition to Grace admitting that you
9 shouldn't have unprotected exposure to this stuff and the
10 way it's applied by termite control guarantees unprotected
11 exposure, that should be known to the public either as that
12 was something that was claimed in the lawsuit or that is
13 something we never had a trial on.

14 And if you read the Superior Court decision, it
15 does not mention Syloid 244 or the fact that it's dangerous
16 or the fact that three different government agencies issued
17 violation notices on the basis that it was illegal to use.
18 It's not in the Superior Court decision. It's not in the
19 Court of Appeal decision that this has been determined by
20 government officials in California in charge of pesticide
21 regulation to be dangerous and it was illegal to sell this,
22 and they were -- they meaning termite control, the
23 applicator -- was cited for it, and it's not in Grace's
24 motion for summary judgment.

25 Whatever you decide in Grace's motion for summary

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1 judgment, there should be a statement that claimant claims
2 that this is a dangerous substance that's ultra-high
3 hazardous to use, and that there's not been a decision on
4 the merits of this. This entire thing has been a rush job
5 when there's an incredibly complex story of how much effort
6 has been gone through to squash this information.

7 And so, I want you to clearly understand that
8 Grace has hidden from you and the public that they illegally
9 manufactured, they illegally sold a toxic substance, and
10 that injuries are claims who have occurred as a result of
11 that.

12 In terms of Grace's right to due process and, you
13 know, having things resolved, I would just note for you an
14 order that you've --

15 THE COURT: Can you hear me?

16 ESR CLERK: I can hear you, Judge.

17 THE COURT: Okay.

18 ESR CLERK: I can hear you now.

19 THE COURT: Mr. Smolker, it sounds to me like from
20 what you're saying that you have several grievances, not
21 just with W.R. Grace, but, you know, with various courts
22 that you've had some interaction in. To the extent that you
23 are dissatisfied with any of the actions taken by other
24 courts, unfortunately, there's nothing I can do about that.

25 And I would also point out that the summary

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1 judgment motion was filed on August 3rd, 2020. And while I
2 know there was some delay in you receiving that motion, you
3 did ultimately receive it. I entered an order on October
4 2nd, 2020 setting forth a scheduling deadline, and you had
5 agreed at that time to file your response by December 16th.
6 You made a request after that time on the eve of that filing
7 deadline to further extend your time to respond to summary
8 judgment, which I granted with the clear condition that
9 there would be no more time given to you, that at some
10 point, we just had to pick a deadline.

11 And you've now had the motion for over five
12 months, which is plenty of time to get all of your materials
13 together and your memorandum, and I warned you at the last
14 hearing in December that December 30th was the last day that
15 I felt comfortable extending your response deadline to.

16 So, unfortunately, given my warning, given the two
17 hearings we've had on this matter where I clearly told you
18 that in balancing the due process rights of you against W.R.
19 Grace, that, you know, I gave you, you know, generous
20 extensions of time to, you know, put together your
21 responses. And, unfortunately, you have not taken advantage
22 of that time and you have not -- those were the only --
23 those were the deadlines that I felt comfortable giving you.

24 And at this point, there is nothing more that I
25 can do for you. You will have to just rest on the pleadings

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1 that filed in front of this Court. I don't know what else
2 to tell you, sir, but I clearly explained to you at both of
3 the hearings and certainly at the last hearing, that you
4 were not going to get anymore extensions of time.

5 So, unfortunately, the Court is denying your
6 request for additional time, and I would direct W.R. Grace
7 to file whatever response it believes is appropriate to Mr.
8 Smolker's 700-page plus response and the other exhibits he's
9 filed, and we are going to have a hearing on this in
10 February. I believe that the hearing is currently scheduled
11 for -- isn't it February 1st, Joan, at 12:00 p.m.; is that
12 correct?

13 CLERK: Yes, it is.

14 THE COURT: Okay. So I expect all parties to call
15 in at that time, and I will have the hearing. Jamie, did
16 you need additional time to file your response to Mr.
17 Smolker's response?

18 MR. O'NEILL: So, hi, this is, yes, James O'Neill.
19 So my colleague and co-counsel, Mr. Higgins, is on the
20 phone, and he is going to be doing the primary drafting for
21 this matter, so I just might ask him whether our schedule is
22 okay.

23 THE COURT: Okay.

24 MR. O'NEILL: I believe that we were supposed to
25 file our response by the -- our reply by the 20th of this

1 month.

2 THE COURT: Okay.

3 MR. O'NEILL: So I'll just ask Mr. Higgins to give
4 us an update.

5 MR. HIGGINS: Your Honor, Roger Higgins for W.R.
6 Grace. Insofar as the reply goes, we should be able to get
7 something on file by the 20th of January.

8 I am sorry to bring up at this juncture, there is
9 another complicating factor. Mr. Smolker, on December 28th
10 of last month, December 28th, 2020, served a request for
11 production of documents on Grace with a return date of
12 January 27th, and his various correspondences with us
13 indicated that he intended to use these documents at the
14 February 1st hearing.

15 We plan to file an appropriate pleading prior to
16 the January 27th return date objecting to this request for
17 production because it violates Rule 56(d). And I wanted to
18 alert you to this issue and also to say unless you direct
19 otherwise, Grace was not intending to conduct a meet and
20 confer under Local Rule 7026-1A with Mr. Smolker because
21 this is sort of a zero-one kind of issue where there's no
22 room for compromise; either Grace is required to produce
23 documents or it's not, and we're not even getting to the
24 scope of what the production should be.

25 THE COURT: Okay. So will you be filing something

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1 before me that I'll be ruling on in connection with your
2 opposition to producing that discovery?

3 MR. HIGGINS: Your Honor, our thought was to file
4 something before the 27th of January to be heard in due
5 course.

6 THE COURT: Okay.

7 MR. HIGGINS: But I think that that wouldn't be
8 heard on the 1st, and that we could go ahead on the 1st with
9 the reply -- or with the summary judgment, Your Honor.

10 THE COURT: With the hearing, yup, right.

11 MR. HIGGINS: Yes.

12 THE COURT: Well, that's fine with me, sir.

13 MR. HIGGINS: All right. Thank you, Your Honor.

14 THE COURT: You're welcome. Okay, so I think at
15 this point, we will next meet on February 1st during the
16 telephonic hearing and you'll be able to comply, W.R. Grace,
17 with your reply that will be due before then, and I will
18 talk to all of you then. Anything else from anybody?

19 MR. O'NEILL: No, thank you, Your Honor.

20 THE COURT: Okay, great. Thanks everybody. Have
21 a good one.

22 MR. SMOLKER: Your Honor, I would like to be
23 heard.

24 THE COURT: Yes, Mr. Smolker.

25 MR. SMOLKER: According to my reading of Rule

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1 6(b)(1)(B) of the Federal Rules of Civil Procedure and Rule
2 56(d), I have the right to file a motion for permission to
3 file more papers. There's a thing in the code section that
4 allows one to make a motion and to express why they didn't
5 do it before. It's Rule (6)(b)(1)(B) of the Federal Rules
6 of Civil Procedure and Rule 56(d) of the Federal Rules of
7 Civil Procedure, and I would like to file such a motion by
8 January 15th and, if possible, to have it heard on February
9 1st either before the summary judgment motion or at the same
10 time as the summary judgment motion.

11 THE COURT: Well, Mr. Smolker, I certainly can't
12 give you any legal advice, but you should feel free to file
13 whatever you want to file, and I will respond accordingly.
14 Okay?

15 MR. SMOLKER: But I would like to reserve the time
16 of February 1st. I understand I have to reserve the time of
17 the hearing.

18 THE COURT: Yes. Well, at this point without
19 seeing your motion, I cannot give you a hearing date. So I
20 would just ask that you file your motion and follow the
21 rules, and I will respond appropriately. Okay?

22 MR. SMOLKER: Okay, thank you.

23 THE COURT: All right, thanks everybody.

24 (Concluded at 12:44 PM)

25 * * * * *

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1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, certified that the foregoing
4 transcript is a true and accurate record of the proceedings.

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6 *Sonya M. Ledanski Hyde*

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8 Sonya Ledanski Hyde

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25 Date: January 13, 2021

[& - call]

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